

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

BENITO JULIAN LUNA,

No. 2:04-cv-0627 MCE GGH P

Petitioner,

v.

ORDER

SCOTT KERNAN,

Respondent.

Petitioner is a state prisoner represented by counsel, proceeding with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On April 29, 2015, the Ninth Circuit Court of Appeals vacated the district court's judgment dismissing the petition as untimely, and remanded "for the district court to determine in the first instance, after conducting an evidentiary hearing if necessary, whether Luna diligently pursued his rights through the date of filing, June 3, 2011." The court stated that the district court's determination would control whether the petition should be deemed timely. (ECF No. 61.) On July 30, 2015, the mandate issued. On August 28, 2015, pursuant to this court's order, petitioner filed a motion to expand the record. As it was unopposed, it was granted on October 7, 2015.

A review of the expanded record in light of the Ninth Circuit Court of Appeals order directing this court to consider petitioner's diligence in pursuing his rights through the date of filing the amended petition, June 3, 2011, indicates that petitioner had written over thirty letters to

1 his attorney inquiring about his case prior to that date. See ECF No. 65-2. In light of those letters
2 pertaining to petitioner's diligence, as addressed by the Ninth Circuit, respondent will be given
3 the opportunity to file a brief in opposition to a potential finding of diligence. Should respondent
4 decline to oppose a potential finding in petitioner's favor on this issue, he shall file a statement of
5 non-opposition.

6 Accordingly, IT IS ORDERED that:

7 1. Within **twenty-eight** days of this order, respondent shall file a brief on the issue of
8 petitioner's diligence, or a statement of non-opposition to the potential finding of diligence.
9 2. Petitioner may file a response to any brief in opposition within **fourteen** days
10 thereafter.

11 Dated: October 19, 2015

12 /s/ Gregory G. Hollows

13 UNITED STATES MAGISTRATE JUDGE

17 GGH:076/Luna0627.brf